Supreme Court, U.S.
FILED
DEC 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-778

In the Supreme Court of the United States

JOHN A. KRAEMER,

Petitioner,

vs.

UNIVERSITY OF MINNESOTA and PATRICK J. SPELLACY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner was an auditor with the University of Minnesota who was terminated on April 30, 1987 for unsatisfactory performance. Respondent Patrick J. Spellacy is Director of Audits, and was petitioner's supervisor.

On February 22, 1988, petitioner filed an internal grievance with the University's Office of Equal Opportunity and Affirmative Action. On January 12, 1989, he filed an age discrimination charge with the Equal Employment Opportunity Commission. The EEOC dismissed his charge

and issued petitioner a right to sue letter. Petitioner filed this action in District Court in April 1989.

Respondents moved for summary judgment based on petitioner's failure to file his age discrimination charge within 300 days of the alleged unlawful practice, as required by 29 U.S.C. § 626(d). The District Court granted the motion. Order of District Court, A-2. Petitioner appealed to the Eighth Circuit Court of Appeals, which affirmed the dismissal. Memorandum Opinion of the United States Court of Appeals, Petitioner's Appendix. Both decisions were based on petitioner's failure to file a timely charge and failure to present sufficient evidence to support equitable tolling.

The relevant facts are set forth in the District Court's Memorandum and Respondents' Memorandum in Support of Summary Judgment. To summarize, petitioner's performance as an auditor was a continual problem. Following appropriate progressive disciplinary procedures, respondent Spellacy warned petitioner and eventually suspended him for three days. Mr. Spellacy notified petitioner of his suspension by memorandum dated June 5, 1986. Despite the warning in his suspension letter that if petitioner's evaluations continued to be less than completely satisfactory his employment would be terminated, petitioner's performance on subsequent audits continued to show deficiencies. As a result, he was notified on April 26, 1987, that his employment would terminate effective April 30, 1987.

Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on January 12, 1989. The charge identified April 16, 1987, as the last date on which the alleged discrimination occurred. The EEOC charge was filed approximately one year and nine months after the last incident of alleged discrimination.

The only internal claim of age discrimination made by petitioner was asserted on February 22, 1988, 312 days after notice of his termination. Plaintiff filed a complaint on that date with the University Office of Equal Opportunity and Affirmative Action. Petitioner waited an additional 325

days before filing a charge with the EEOC on January 12, 1989. As noted above, the EEOC found no violation and dismissed the charge. The District Court and its Circuit Court of Appeals granted summary judgment dismissing this lawsuit based on the untimely filing.

REASONS WHY THE WRIT SHOULD BE DENIED

A. *The Questions Presented By Plaintiff Were Not Decided Below, Nor Do They Present Any Special Or Important Reason To Grant The Writ.*

The only basis for petitioner's complaint to the federal courts was age discrimination under 29 U.S.C. § 621, *et seq.*, the Age Discrimination In Employment Act ("ADEA"). Complaint, A-1. Petitioner never attempted to amend his complaint to add any other constitutional or contractual claim. The only issue presented to the District Court in respondents' summary judgment motion was the timeliness of the filing of the EEOC charge. The Eighth Circuit decision was similarly confined. Thus, the only issue which may be presented as a possible basis for a writ of certiorari is whether petitioner complied with the ADEA's statutory condition precedent of timely filing a charge with the EEOC.

Under the ADEA:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed — (1) within 180 days after the alleged unlawful practice occurred; or (2) in a case to which Section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred . . . .

29 U.S.C. § 626(d). Minnesota is a state with a law prohibiting discrimination in employment, and is a deferral state under 29 U.S.C. § 633(b). Thus, petitioner had 300 days

after notification of the alleged unlawful practice to file his charge.

There is no dispute that petitioner missed the 300 day deadline. He did not file a charge with the EEOC until January 19, 1989, almost one year *plus* 300 days after his termination. Summary judgment is appropriate when a plaintiff fails to file an ADEA claim in a timely manner. *Nielson v. Western Electric Company, Inc.*, 603 F.2d 741 (8th Cir. 1979). A private lawsuit is barred in light of an untimely filing, and must be dismissed. *Id.*

In addition, any allegations regarding discrimination in 1986 (the date of petitioner's suspension) are barred by the ADEA's two-year statute of limitations, since this lawsuit was not filed until April 1989. 29 U.S.C. § 626(e).

Equitable tolling is appropriate only when the employer engages in positive misconduct causing the plaintiff to miss the deadline for reasons outside of his control. *Heideman v. PFL, Inc.*, 904 F.2d 1262 (8th Cir. 1990). The reasons for petitioner's termination were made known to him in writing and in detail on April 16, 1987, and for his suspension on June 5, 1986. Respondent's Brief to Court of Appeals, Addendum pp. 19-23. There was no deception involved, nor any non-disclosure of the reasons for his termination. Indeed, petitioner has repeatedly stated he suspected age discrimination as of June 1986, which shows he knew he had legal rights. Nothing prevented him from pursuing his rights. Petitioner presents no other reason to invoke equitable tolling. The Court of Appeals' decision finding insufficient evidence to support equitable tolling should be upheld.

B. *There Are No Undecided Questions Of Federal Law, Nor Any Conflicts Between The Circuits.*

There is no unsettled question of law in this case. The statutory provisions are quite clear. In *EEOC v. Commercial Office Products Company*, 486 U.S. 107, 123-4 (1988), this Court noted that the filing provisions of the ADEA are patterned after those in Title VII. In *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982), this Court held that a timely

charge of discrimination with the EEOC was filing a condition precedent to filing a federal lawsuit, but that the requirement was subject to waiver, estoppel and equitable tolling. The decision of the Court of Appeals below is consistent with and follows exactly the directions of the United States Supreme Court.

Similarly, there is no dispute between the circuits. In *Heideman v. PFL, Inc.*, 904 F.2d 1262 (8th Cir. 1990), the Eighth Circuit recently reasserted its position in conformance with the Supreme Court, dismissing a claim based on an untimely charge and lack of a factual basis for equitable tolling. Other circuits agree. *Price v. Litton Business Systems, Inc.*, 694 F.2d 963, 965-6 (4th Cir. 1982) (dismissed based on an untimely charge); *Coke v. General Adjustment Bureau, Inc.*, 616 F.2d 785, 790 (5th Cir. 1980) (tolling the filing period because the employer had stated it would reinstate plaintiff); *Wilkerson v. Ziegfried Insurance Agency, Inc.*, 621 F.2d 1042, 1045 (10th Cir. 1980) (tolling possible because the plaintiff thought her position had been abolished but in reality she had been replaced). Differing results based on application of law to the facts do not create a legal dispute among the circuits.

CONCLUSION

None of the grounds for exercise of discretion in granting a writ of certiorari are presented by Petitioner. *See* Supreme Court Rule 10.1. There is no important undecided question of federal law or conflict between the circuits presented by this case. The facts are undisputed that petitioner failed to timely file his charge with the EEOC. The writ of certiorari should be denied.

Respectfully submitted,

Dated: December 7, 1990

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Counsel of Record
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ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

RESPONDENTS' APPENDIX

In the United States District Court
For the District of Minnesota
_____ Division

JOHN A. KRAEMER
(NAME)

Plaintiff,

vs. Civil Action No. _____

UNIVERSITY OF MINNESOTA AND
PATRICK J. SPELLACY
(NAME)

Defendant,

COMPLAINT

Now comes the above plaintiff and shows the Court the following:

1.

Plaintiff's residence or address
1410 RIVERVIEW DRIVE
STILLWATER, MN 55082

2.

Defendant(s)'s address(es)
UNIVERSITY OF MINNESOTA, MINNEAPOLIS, MN. 55455
AND PATRICK J. SPELLACY, 4290 HIGHLAND DRIVE,
SHOREVIEW, MN 55112

3.

State briefly your legal claim or your reason for filing suit. Include the United States Code statute under which the suit is filed.

AGE DISCRIMINATION AND
RETALIATION. U.S.C. TITLE 29§§ 621-634

4.

Give a brief, concise statement of the specific facts involved in your case.

DISCRIMINATORY USE OF PERFORMANCE EVALUATIONS AND CONSEQUENT RETALIATION AND TERMINATION.

5.

State the relief you are requesting.

TO BE DETERMINED.

4/13/89 JOHN A. KRAEMER

Date and sign the complaint

United States District Court

District of Minnesota

THIRD DIVISION

JOHN A. KRAEMER,
Plaintiff,
v.

3-89 CIV 530

ORDER

UNIVERSITY OF MINNESOTA and
PATRICK J. SPELLACY,
Defendants.

JOHN A. KRAEMER, plaintiff, of Stillwater, Minnesota appeared pro se.

JULIE A. SWEITZER, Esq., of Minneapolis, Minnesota, appeared on behalf of defendants.

The above-entitled matter came before the court on November 3, 1989 on defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56(b).

I. *STANDARD OF REVIEW*

The Supreme Court has reaffirmed summary judgment as a tool to isolate and dispose of claims or defenses which are either factually unsupported or which are based on undisputed facts. *Celotex Corp. v. Catrett*, 477 U.S. 317,

323-324 (1986); *Hegg v. United States*, 817 F.2d 1328, 1331 (8th Cir. 1987). Summary judgment is proper, however, only if examination of the evidence in a light most favorable to the non-moving party reveals no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The test for whether there is a genuine issue over a material fact is two-fold. First, the materiality of a fact is determined from the substantive law governing the claim. Only disputes over facts that might affect the outcome of the suit are relevant on summary judgment. *Liberty Lobby*, 477 U.S. at 252; *Lomar Wholesale Grocery, Inc., v. Dieter's Gourment Foods, Inc.*, 824 F.2d 582, 585 (8th Cir. 1987). Second, any dispute over material fact must be "genuine." A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party. *Liberty Lobby*, 477 U.S. at 252. It is the non-moving party's burden to demonstrate that there is evidence to support each essential element of his claim. *Celotex*, 477 U.S. at 324.

II. *FACTUAL BACKGROUND*

This action involves a dispute between the plaintiff John Kraemer and the defendants: his former supervisor, Patrick Spellacy, and his former employer, the University of Minnesota ("University"). Defendants move for summary judgment, and a summary of the facts in a light most favorable to the plaintiff follows.

As of August, 1982 Kraemer, an auditor in the University's Department of Audits, was supervised by Patrick Spellacy. In June of 1986 Spellacy suspended plaintiff for three days because of his alleged poor performance. At that time Kraemer received a warning that if his evaluations continued to be less that satisfactory he would be terminated. Citing continued poor performance on Kraemer's part, Spellacy terminated him effective April 30, 1987 and notified plaintiff of this on April 16, 1987.

Kraemer filed an internal claim with the University on February 22, 1988, 312 days after notice of his termination. In addition, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on January 12, 1989, approximately one year and nine months after he received his termination notice. The charge identifies April 16, 1987 as the last date on which the alleged discrimination occurred and plaintiff admits that he suspected discrimination by June of 1986 when he was suspended.

The EEOC determined that there was no violation of the Age Discrimination and Employment Act by the University. Plaintiff then filed this lawsuit alleging age discrimination under the act.

III. *ANALYSIS*

Under the Age Discrimination and Employment Act ("ADEA"):

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed – (1) within 180 days after the alleged unlawful practice occurred; or (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under state law, whichever is earlier.

29 U.S.C. § 626(d). Defendants concede that Minnesota is a state with a law prohibiting discrimination in employment, and is a deferral state under section 633(b). Thus, plaintiff had 300 days after notification of the alleged unlawful practice to file his charge.

Plaintiff received notice of his termination on April 16, 1987 and waited to file a charge with the EEOC until January of 1989, well beyond the permitted 300 days. Summary judgment is appropriate when a plaintiff fails to file an ADEA claim in a timely manner. *Nielson v. Western*

Electric Company, Inc., 603 F.2d 741 (8th Cir. 1979).

Aithough he failed to meet the 300-day filing requirement, Kraemer claims there should be an equitable tolling of this period and he should be allowed to go ahead with this suit. The plaintiff, however, has not submitted sufficient evidence to support such a tolling. Equitable tolling is proper where the employer concealed or misrepresented the reasons for the discharge. *Nielson*, 603 F.2d at 743. It is clear the plaintiff was not in any way misled by the defendants. Indeed, the plaintiff himself admits that he suspected age discrimination as early as June 1986. In addition, plaintiff received notice of his termination in August of 1987. The court thus finds Kraemer has failed to establish adequate reason to toll the 300-day notice period. Therefore, plaintiff's private cause of action is barred by failure to comply with the requirements of 29 U.S.C. §§ 626, 633(b) and the court will grant defendants' motion for summary judgment.

Accordingly,

IT IS HEREBY ORDERED That:

1. Defendants' motion for summary judgment is GRANTED; and

2. The Clerk of Court shall enter judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED That the complaint of plaintiff John A. Kraemer is DISMISSED in its entirety and that he have and recover nothing by his action.

DATED: January 2, 1990.

DONALD D. ALSOP
Chief U.S. District Judge